

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC 20591

Served: August 12, 1991

FAA Order No. 91-33

In the Matter of:

DELTA AIR LINES, INC.

Docket No. CP90\*\*0049

OPINION AND ORDER

Complainant has appealed from the oral initial decision of Administrative Law Judge Robert L. Barton, Jr., issued at the conclusion of the hearing held in this case on March 4, 1991, in \* \* \* .<sup>1/</sup> In his initial decision, the law judge found that Respondent violated Section 108.5(a)(1) of the Federal Aviation Regulations (FAR), 14 C.F.R.

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1/ A copy of the law judge's initial decision is attached. Because this matter was consolidated for hearing with three similar cases, the initial decision contains discussion and findings pertaining to four separate cases. Although some names and identifying features have been redacted from the initial decision for security reasons (see footnote 2 below), docket numbers have been inserted where necessary so that pertinent portions of the initial decision can be identified.

2/ Portions of this decision and the law judge's initial decision have been redacted for security reasons, pursuant to 14 C.F.R. Part 191. All unredacted copies of this decision must be treated in a confidential manner. Unredacted copies of this decision may not be disseminated beyond the parties to this proceeding and those carriers bound by the SSP, all of whom have been given unredacted copies in addition to redacted copies.

§ 108.5(a)(1),<sup>3/</sup> because it did not carry out that portion of its approved security program which requires all of its employees in nonpublic areas to wear an appropriate identification badge on their outermost garment unless precluded from wearing a badge by operational or safety reasons. Nonetheless, the law judge reduced the \$1,000 civil penalty sought in the complaint to a "minimal" fine of \$250, based on what he found to be mitigating circumstances. For the reasons set forth below, Complainant's appeal is denied, and the law judge's initial decision is affirmed.

The incident which forms the basis of this action occurred on January 7, 1988, at \* \* \* . On that date, \* \* \* , then the Manager of the FAA's local Civil Aviation Security Field Office (CASFO), observed a Delta employee in a nonpublic area of the airport (the air operations area) who was not wearing an identification badge on his outermost garment. Upon questioning by \* \* \* , the employee produced his identification badge and attached it to his outermost garment.

The Delta employee testified at the hearing that he had been \* \* \*

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3/ Section 108.5(a)(1) of the FAR, 14 C.F.R. § 108.5(a)(1), provides:

Each certificate holder shall adopt and carry out a security program that meets the requirements of section 108.7 for each of the following scheduled or public charter passenger operations: (1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.

. He stated that it was his understanding at that time that, as long as he was \* \* \*

, he could have the badge in his pocket. The Delta employee testified several times that he was preparing to \* \* \*

. He also testified that he was not sure if \* \* \*

. During cross-examination, moreover, he indicated that he had completed "his portion" of \* \* \* and, that when he was approached by \* \* \* , he was waiting to participate in "wing-walking" the aircraft while it taxied.

Respondent's approved security program provides that all air carrier employees in nonpublic air carrier and airport areas, including airplanes, shall wear an air carrier, airport, or other acceptable identification badge on their outermost garment, unless precluded from wearing one by operational or safety reasons. According to the testimony, prior to late 1987, this badge display requirement was not enforced at \* \* \* , and air carrier and airport employees were permitted to carry their badges in their pockets, even in restricted areas.

In late 1987, \* \* \* informed airport and air carrier representatives that the FAA expected employees to wear their badges on their outermost garments, except under certain operational or safety conditions such as \* \* \*

. The conditions under which badges did not need to be worn were further discussed and clarified at monthly meetings of the airport's Security Committee, which were attended by representatives of all concerned air carrier and airport entities, as well as by \* \* \* or some other representative of the FAA. According to Delta's Station Manager, clarification of the "grey areas" surrounding the exceptions to the badge display requirement continued through the spring of 1988. The present CASFO Manager at \* \* \*

, who succeeded \* \* \* in that post, testified that as of the date of this incident neither she nor \* \* \* had told air carrier representatives exactly when they considered the act of \* \* \* to have ended.

In his initial decision, the law judge found that at the time \* \* \* approached the Delta employee, the employee had just completed the process of \* \* \*

. In view of the then-recognized \* \* \* exception to the badge display requirement, the law judge found there was "some justification of the fact that [the Delta employee] had not immediately put his identification badge on." Based upon this finding, the law judge reduced the \$1,000 civil penalty sought in the complaint to \$250.

On appeal, Complainant argues that the badge display requirement was clear and understandable at the time of this incident, and that Respondent failed to demonstrate the applicability of any exception to that requirement. Complainant contends that no mitigating circumstances exist in

this case to justify the law judge's reduction in sanction, and that the full \$1,000 civil penalty sought in the complaint should be assessed. Respondent replies that the record supports a finding that no violation occurred, or at least that the law judge's reduction of sanction was proper. Respondent argues that, because the FAA had accepted the practice of not wearing badges up until shortly before this incident, and because the exceptions had not yet been fully delineated, the employee in this case was justified in believing that he was covered by the \* \* \* exception to the badge display requirement.

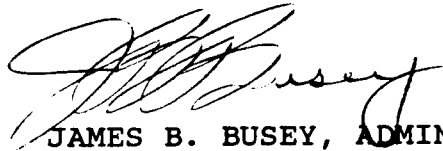
It is undisputed that, at some point prior to being approached by \* \* \* , the employee in this case was \* \* \* , and that while he was engaged in that activity he was exempt from the badge display requirement. It is not realistic or reasonable to require employees to display their badges the instant an exempt activity, such as \* \* \* , is complete. Necessarily, there must be a short "grace" period during which employees who have just completed an exempt activity may have time to re-attach their badges.

Although it is not clear exactly how much time had elapsed in this case between the employee's completion of the \* \* \*

and his encounter with \* \* \* , the record in this case, and the law judge's finding that the employee had "just finished" the \* \* \* and was justified in not immediately re-attaching his badge, lead me to conclude that the employee

was still within the protected zone. Accordingly, I will not reinstate the \$1,000 civil penalty as Complainant requests. Furthermore, I will not disturb the law judge's finding of liability in this case (as Respondent urges in its reply brief) because Respondent did not file an appeal from the initial decision.

THEREFORE, for the reasons stated above, the law judge's initial decision is affirmed. A civil penalty of \$250 is hereby assessed.



JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 1st day of August 1991.